

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ABBOTT CARDIOVASCULAR
SYSTEMS, INC. and ABBOTT
LABORATORIES, INC.,

Plaintiffs,

V.

MEDTRONIC VASCULAR, INC. and
MEDTRONIC USA, INC.,

Defendants.

REDACTED PUBLIC
VERSION

Civil Action No. 98-80 (SLR)
(Consolidated with C.A. No. 98-314 (SLR)
and C.A. No. 98-316 (SLR))

**MEDTRONIC'S REPLY IN SUPPORT OF ITS MOTION
FOR LEAVE TO FILE SURREPLY TO ABBOTT'S MOTION
TO LIFT STAY OF PROCEEDINGS ON ABBOTT'S MOTION FOR
PERMANENT INJUNCTION AS TO MEDTRONIC'S ENDEAVOR**

In its Opposition to Medtronic’s Motion for Leave (D.I. 832), Abbott argues that Medtronic’s Proposed Surreply “belatedly raises new arguments,” which “would . . . unfairly prejudice[]” Abbott. (D.I. 839 at 2.) This argument is wholly inaccurate for the following reasons.

First, Medtronic's Proposed Surreply (and the evidence submitted in support thereof) is limited to responding to the following two misstatements made for the first time in Abbott's Reply:

and (2) that additional *eBay* discovery regarding Abbott's attempt to enjoin Endeavor is unnecessary. (*See* D.I. 832 Ex. 1; *see also* D.I. 830 at 5, 7.) Medtronic could not have anticipated that it would need to respond to these misleading assertions in its Answering Brief given that Abbott's perfunctory, two-page Opening Brief makes no reference whatsoever to these arguments. (*See* D.I. 824.) As a result, the Proposed Surreply is proper. *See Roberts*

Enters., LP v. Fun Sport, Inc., 2008 U.S. Dist. LEXIS 18522, at *1-*2 n.1 (D. Del. Mar. 7, 2008) (granting the defendant's motion to file surreply to respond to an argument raised for the first time in the plaintiff's reply brief); *True N. Composites, LLC v. Trinity Indus., Inc.*, 191 F. Supp. 2d 484, 523 & n.2 (D. Del. 2002) (same); *Eaton Corp. v. Rockwell Int'l Corp.*, 2000 U.S. Dist. LEXIS 21210, at *5-*6 (D. Del. Nov. 7, 2000) (same).

Second, because a surreply was only necessitated by the above-mentioned misstatements, any prejudice resulting from Medtronic's correction of the record is of Abbott's own doing. Notably, although Abbott dismisses Medtronic's argument that the Surreply is necessary to respond to the above-mentioned misstatements as "totally incorrect," it does not even attempt to justify the statements at issue. (D.I. 839 at 2.) Abbott's suggestion that it would be prejudiced if it were unable to respond to Medtronic's Proposed Surreply is questionable given that it has failed to give any indication that it even has a substantive response.

In light of the foregoing, and given the importance of the Endeavor Injunction Motion – which seeks to enjoin Medtronic Vascular's largest selling product – it is Medtronic (not Abbott) that will be prejudiced if it is not permitted to file a surreply to address Abbott's misstatements.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on April 28, 2008 I electronically filed the foregoing with the Clerk of the Court using CM/ECF which will send notification of such filing to Frederick L. Cottrell, III.

I further certify that on April 28, 2008 I served copies of the foregoing to the following counsel in the manner indicated:

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